

SECOND AMENDED

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**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

| | |
|---|-------------------------------------|
| United States District Court | District |
| Name (under which you were convicted): Elvin Mercado | Docket or Case No.: 02-10259 |
| Place of Confinement: FMC Devens, Ayer, MA | Prisoner No.: 24448-038 |
| UNITED STATES OF AMERICA Movant (include name under which you were convicted) v. Elvin Mercado | |

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____
United States District Court for the District of Massachusetts
One Courthouse Way
Boston, MA 02210
(b) Criminal docket or case number (if you know): 02-10259
2. (a) Date of the judgment of conviction (if you know): July 22, 2003
(b) Date of sentencing: July 22, 2003
3. Length of sentence: 188 months incarcerated; 60 months supervised release
4. Nature of crime (all counts):
21 U.S.C. § 846: Conspiracy to Distribute Heroin (Count 1)
21 U.S.C. § 841(a)(1): Distribution of Heroin (Counts 2, 3, 5-10, and 12)
18 U.S.C. § 2: Aiding and Abetting (Counts 5 and 10)
5. (a) What was your plea? (Check one)

(1) Not guilty (2) Guilty (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____

6. If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____
(2) Docket or case number (if you know): _____
(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes No

(2) Second petition: Yes No

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Ineffective Assistance of Counsel Rendered Petitioner's Guilty Plea

Involuntary and Unknowing

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
Petitioner's former counsel promised Petitioner that the government had agreed to recommend to the Court a five-year maximum sentence in exchange for his cooperation and guilty plea. Petitioner's former counsel promised Petitioner that he would in fact receive a five-year maximum sentence if he pleaded guilty. Petitioner's former counsel also failed to explain the plea agreement to Petitioner at any level. Petitioner hereby incorporates the additional factual allegations contained in his Memorandum in Support of Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Ineffective Assistance of Counsel Denied Petitioner His Right to Appeal

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
Petitioner's former counsel disregarded Petitioner's request that he file a notice of appeal on Petitioner's behalf. He also affirmatively misled Petitioner with respect to the ten-day deadline for filing a notice of appeal. Further, the waiver of appellate rights contained in the plea agreement was not valid because former counsel's ineffective assistance rendered it involuntary and unknowing and because the Court never confirmed Petitioner's understanding that he had agreed to waive his right to appeal. Petitioner hereby incorporates the factual allegations contained in his Memorandum in Support of Amended Motion under 28 U.S.C. § 2255 to Vacate,

Set Aside, or Correct Sentence.**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No (2) If you did not raise this issue in your direct appeal, explain why: _____

_____**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND THREE: Petitioner Vacated Two State Court Convictions this Court Relyed Upon to Sentence Petitioner

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
On October 18, 2006, the Lowell District Court granted Petitioner's motion to vacate two state court convictions on the ground that his guilty pleas were not knowing and voluntary and were therefore constitutionally invalid. This Court relied upon these two state court convictions to sentence Petitioner. Petitioner hereby incorporates the factual allegations contained in his Memorandum in Support of Second Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): _____

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: **Petitioner has not yet raised any of the grounds contained in this motion in any federal court either because he received ineffective assistance of counsel or because the issue was not yet ripe.**

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes No
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: **Unknown**

(b) At arraignment and plea: **Steven J. Rappaport**

(c) At trial: **N/A**

(d) At sentencing: **Steven J. Rappaport**

(e) On appeal: N/A

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes No

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion. * **Petitioner's original § 2255 motion was filed in this case within the one-year statute of limitations.**

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: (1) Resentence Petitioner, or
(2) grant whatever other relief the Court deems appropriate.

or any other relief to which movant may be entitled.

/s/ Roberto M. Braceras

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____
_____ (month, date, year).

Executed (signed) on December 1, 2006 (date).

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not
signing this motion. Roberto M. Braceras is Petitioner's attorney and is filing this motion
on Petitioner's behalf.

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

* * * *

LOCAL RULE 7.1(A)(2) CERTIFICATION

The undersigned certifies that, pursuant to Local Rule 7.1(A)(2), the moving party has conferred with counsel for the government, Assistant U.S. Attorney Peter K. Levitt, on the matters set forth in the foregoing motion, and the government assents to this motion.

I further certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on December 1, 2006.

Respectfully submitted,

/s/ Roberto M. Braceras

Dated: December 1, 2006

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